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Lim Kim Wei v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05(M)-553–11 OF 2018
KAMARDIN HASHIM, RHODZARIAH BUJANG AND MOHAMAD ZABIDIN JJCA
5 SEPTEMBER 2019

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged with offence of drug trafficking under s 39B(1)(a) of Dangerous Drugs Act 1952 — Whether learned trial judge erred in assessment of defence of appellant — Whether learned trial judge erred when relied on both presumptions under s 37(d) and (da) — Dangerous Drugs Act 1952 ss 37(d) & 39B(1)(a)

D

The appellant was charged and convicted by the High Court in Johor Bahru for an offence of trafficking of drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and was sentenced to death. The appellant filed an appeal against the conviction and sentence. Together with 13 of his men, the raiding cum arresting officer ('PW3') went to the 24th floor of a condominium called Zenith Suites based on information received of drug activities going on at the penthouse on the said floor. Upon reaching the said floor PW3 saw the appellant standing beside the lift. He introduced himself to the appellant and proceeded to do a physical search on him. He found in the appellant's right hand was a plastic bag inside of which were two transparent plastic packets found to be ketamine. Upon discovery of a car remote control key in his trouser pocket the appellant brought the police to his car. Inside its boot was found a black zipped bag containing transparent plastics packets which contained the drug ketamine, cannabis and ecstasy pills of different colours as well as 20 Eramine 5 pills. Besides the black bag was a red plastic bag in which three transparent plastic packets containing ecstasy pills were also found. Inside a box with the label 'UBAT BATUK CAP IBU DAN ANAK' were found seven transparent plastic packets also containing ecstasy pills. On the floor of the back seat was a bag which contained cash amounting to RM46,270. Upon these discoveries, the appellant was arrested and thereafter PW3 and his men raided the penthouse and arrested five others by another officer. Four of the arrestees, including one Chinese national, a lady named Lin Qiao Ying ('Qiqi') were charged with possession of drugs under s 12(2) of the DDA. The learned judicial commissioner found that the appellant had mens rea possession of the drugs and invoked the presumption of knowledge under s 37(d) of the DDA. The issues for consideration were: (a) whether the learned trial judge erred in the assessment of the defence of the appellant; and (b) whether the learned trial

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judge erred when His Lordship relied on both the presumptions under s 37(d) and (da) to find there was a prima facie case of trafficking and consequently convicted the appellant for the offence of trafficking.

Held, allowing the appeal:

(1) The learned judicial commissioner had found that the appellant had mens rea possession and yet raised the presumption on knowledge under s 37(d) of the DDA which was a serious misdirection. Not only had the learned judicial commissioner fallen into error when labelling the defence as an afterthought, His Lordship also failed to appreciate the defence of the appellant. There was evidence by the appellant's friend ('DW2') and PW3 that rendered the probability that the said drugs was brought by Qiqi to the penthouse and that she was the real trafficker. Thus, when the trial judge had committed such a misdirection which had led to his failure to give due consideration or evaluation on the evidence adduced by the defence and prejudiced his mind against it, the court was left with no other alternative but to discharge and acquit the appellant as that conviction could not stand (see paras 18 & 20).

(2) The arrest in the penthouse and that of the appellant right outside it could not be unrelated for PW3 had admitted that the information he received was on the drug activities in the penthouse. The evidence of DW2 further strengthened that connection. Therefore, the defence of the appellant must also be viewed and considered in the light of that connection (see para 21).

(3) It was not just the issue of ownership of the drug which was raised in the defence — it was the knowledge of the appellant that the bag in the boot of his car contained drugs. Without that knowledge he could not be found to be trafficking in it. Here the probability that he had no such knowledge had been shown from both his evidence and that of DW2 as well as the absence of Qiqi's evidence at the trial. Therefore, the prosecution had failed to prove its case against the appellant beyond reasonable doubt (see para 22).

[Bahasa Malaysia summary

Perayu didakwa dan disabitkan oleh Mahkamah Tinggi di Johor Bahru atas kesalahan mengedar dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan dijatuhkan hukuman mati. Perayu mengemukakan rayuan terhadap sabitan dan hukuman. Bersama dengan 13 anggota pasukannya, pegawai serbuan merangkap pegawai tangkapan ('PW3') telah ke tingkat 24 sebuah kondominium bernama Zenith Suites berdasarkan maklumat yang diterima mengenai kegiatan dadah yang berlaku di penthouse di tingkat tersebut. Setelah sampai di tingkat tersebut PW3 melihat perayu berdiri di sebelah lif. Dia memperkenalkan dirinya kepada perayu dan terus melakukan

carian fizikal kepadanya. Dia mendapati di tangan kanan perayu adalah beg plastik di dalamnya terdapat dua paket plastik lutsinar yang didapati adalah ketamin. Setelah menemui kunci alat kawalan jauh kereta di poket seluarnya, perayu membawa polis ke keretanya. Di dalam butnya dijumpai beg berzip hitam yang berisi paket plastik lutsinar yang mengandungi dadah ketamin, ganja dan pil ekstasi pelbagai warna serta 20 pil Eramine 5. Selain beg hitam itu terdapat beg plastik merah di mana terdapat tiga paket plastik lutsinar yang mengandungi pil ekstasi. Di dalam kotak dengan label 'UBAT BATUK CAP IBU DAN ANAK' terdapat tujuh bungkusan plastik lutsinar yang juga mengandungi pil ekstasi. Di lantai tempat duduk belakang terdapat beg yang berisi wang tunai berjumlah RM46,270. Atas penemuan ini, perayu ditangkap dan selepas itu PW3 dan anak buahnya menyerbu penthouse tersebut dan menangkap lima yang lain oleh pegawai lain. Empat orang yang ditangkap, termasuk seorang warganegara China, seorang wanita bernama Lin Qiao Ying ('Qiqi') didakwa memiliki dadah di bawah s 12(2) ADB. Pesuruhjaya kehakiman yang bijaksana mendapati bahawa perayu mempunyai mens rea terhadap dadah tersebut dan membangkitkan anggapan pengetahuan di bawah s 37(d) ADB. Isu-isu untuk pertimbangan adalah: (a) sama ada hakim perbicaraan yang bijaksana terkhilaf dalam penilaian pembelaan perayu; dan (b) sama ada hakim perbicaraan yang bijaksana terkhilaf apabila bergantung pada kedua-dua anggapan di bawah s 37(d) dan (da) untuk mendapati bahawa terdapat kes prima facie pengedaran dan seterusnya mensabitkan perayu atas kesalahan pengedaran.

Diputuskan, membenarkan rayuan:

(1) Pesuruhjaya kehakiman yang bijaksana telah mendapati bahawa perayu mempunyai mens rea namun telah membangkitkan anggapan pengetahuan di bawah s 37(d) ADB yang merupakan salah arah yang serius. Pesuruhjaya kehakiman yang bijaksana tidak hanya terkhilaf ketika melabelkan pembelaan sebagai fikiran semula, Yang Arif juga gagal menghargai pembelaan perayu. Terdapat keterangan oleh rakan perayu ('DW2') dan PW3 yang menunjukkan kemungkinan bahawa dadah tersebut dibawa oleh Qiqi ke penthouse dan bahawa dia adalah pengedar sebenar. Oleh itu, ketika hakim bicara telah melakukan salah arah yang menyebabkan kegagalannya memberikan pertimbangan atau penilaian sewajarnya terhadap keterangan yang dikemukakan oleh pihak pembelaan dan memprejudiskan fikirannya, mahkamah tidak memiliki alternatif lain selain melepaskan dan membebaskan perayu kerana sabitan itu tidak boleh dikekalkan (lihat perenggan 18 & 20).

(2) Penangkapan di penthouse dan perayu di luar penthouse tersebut tidak mungkin tidak berkaitan kerana PW3 telah mengakui bahawa maklumat yang diterimanya adalah mengenai aktiviti dadah di penthouse tersebut. Keterangan DW2 mengukuhkan lagi hubungan itu. Oleh itu,

pembelaan perayu juga harus dilihat dan dipertimbangkan berdasarkan hubungan itu (lihat perenggan 21).

(3) Bukan hanya isu milikan dadah yang dibangkitkan dalam pembelaan — tetapi pengetahuan perayu bahawa beg di dalam keretanya mengandungi dadah. Tanpa pengetahuan itu, dia tidak boleh didapati memperdagangkannya. Di sini kebarangkalian dia tidak memiliki pengetahuan ditunjukkan daripada kedua-dua keterangannya dan keterangan DW2 serta ketiadaan keterangan Qiqi di perbicaraan. Oleh itu, pihak pendakwaan gagal membuktikan kesnya terhadap perayu melampaui keraguan munasabah (lihat perenggan 22).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)

Mohd Johi bin Said & Anor v PP [2005] 5 MLJ 409; [2005] 1 CLJ 389, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), (3), 37(d), (da), 37A, 39B(1)(a), 39B(2)

Evidence Act 1950 s 114(g)

Appeal from: Criminal Trial No 45A-27–06 of 2017 (High Court, Johor Bahru)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.

Mohd Zain bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang JCA:

[1] The appellant in this appeal before us was charged and convicted by the High Court in Johor Bahru for an offence of trafficking in 111.94g of 3,4-methylenedioxymetham–phetamine ('MDMA') under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and he was sentenced to death as a consequence of it under s 39B(2) thereof. He was also charged and convicted of three other charges which were for possession of 66.43g and 32.05g of ketamine, that is the second and third amended charges, respectively and 0.13g of nimetazepam under s 12(2) of the DDA, which was the subject matter of the fourth amended charge. He was sentenced to two years imprisonment for each of the said charges under s 12(3) thereof and the two years imprisonment were

ordered to run concurrently and to take effect from the date of his arrest, which was 31 December 2016.

[2] The appellant only filed an appeal against the conviction and sentence for the drug trafficking charge. That notice of appeal dated 29 October 2018 was filed in person by him (see p 3 of the appeal record Vol 1). However, at the hearing of the appeal before us, learned counsel for the appellant, in his written submission mentioned that the appeal was against all four convictions and sentences. Given that no other notices of appeal had been filed subsequent to the one mentioned above, we were constrained to say that there was only one appeal before us and that is in respect of the drug trafficking charge. Hence we would in this appeal be concentrating on facts and issues relevant to the said charge of trafficking only, although admittedly there would be some overlapping of these facts and/or issues in respect of the other charges. The first charge was amended at the trial and reads as follows:

> PERTUDUHAN PINDAAN PERTAMA
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> Bahawa kamu 30 Disember 2016, jam lebih kurang 11.45 malam, bertempat di kawasan belakang rumah kedai berhadapan Pangsapuri Zennith Suites, Jalan Kebun Teh 2, Larkin di dalam Daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim telah didapati mengedar dadah berbahaya iaitu 3,4-Methylenedioxymethamphetamine (MDMA) seberat 111.94 gram dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE PROSECUTION'S CASE

[3] The facts upon which the prosecution based their case on rest on their first four witnesses, one of whom was the chemist Siti Zubaidah bt Hanapi ('PW2'), the raiding cum arresting officer, Insp Hisham bin Abu ('PW3'), the investigating officer, Insp Wan Nur Munirah bt Wan Roslan ('PW1') and finally the store keeper, Cpl Arshad ('PW4'). There was no controversial issue respecting the chemist evidence raised before us for it was accepted by the defence that the drugs seized at that time as stated in the charges were of the type and weight as analysed by her. There was also no issue raised in respect of the chain of evidence respecting the drugs seized and thus the evidence of the store keeper is also not going to be highlighted in our judgment. What formed the central and core issue before us was the appellant's presence and knowledge of the MDMA and that issue rest principally on the evidence of PW3 and his evidence is laid down below.

[4] Together with 13 of his men, PW3 went to the 24th floor of a condominium called Zenith Suites as stated in the charge and this was based on information received of drug activities going on at the penthouse on the said

floor. Upon reaching the condominium at about 11.15pm they proceeded to use the lift to go to the 24th floor. Upon reaching the said floor and stepping out of the lift PW3 saw the appellant standing beside the said lift near a table placed at the wall on his right. He introduced himself to the appellant and proceeded to do a physical search on him. He found in the appellant's right hand was a plastic bag 'bercorak bunga' inside of which were two transparent plastic packets (exhs P9A(i) and P9A(ii)) which upon analysis by PW2 was found to be ketamine and this was the subject matter of the second charge. PW3 said the appellant reacted to the discovery by saying 'Boleh tolong tak?'.

[5] Thereafter, upon discovery of a car remote control key in his trouser pocket, the appellant brought the police to his car which was parked by the road side of the condominium's car park and behind a shophouse building. The car was opened with the remote control and inside its boot was found a black zipped bag (exh P9C) containing transparent plastics packets which contained the drug ketamine, which is the subject matter of the third amended charge. We paused here to mention, to avoid any confusion later, that the learned judicial commissioner in his judgment referred to the said boot of the car as 'bonet' which with respect is not the correct terminology as bonnet refers to the metal canopy which covers the engine of a car. In the middle of the said bag were also found transparent plastics packets containing cannabis and ecstasy pills of different colours as well as 20 eramine 5 pills. The eramine 5 pills were the subject matter of the fourth amended charge.

[6] Besides the black bag was a red plastic bag (exh P9D) in which three transparent plastic packets containing ecstasy pills were also found. Inside a box with the label 'UBAT BATUK CAP IBU DAN ANAK' (exh P9D(vi)) were found seven transparent plastic packets also containing ecstasy pills. On the floor of the back seat was a bag which contained cash amounting to RM46,270.

[7] Upon these discoveries, the appellant was arrested and thereafter PW3 and his men raided the penthouse and arrested five others but the investigation in respect of that arrest and seizure of drugs was conducted by another officer. The investigation officer agreed in cross-examination that four of the arrestees, including one Chinese National, a lady named Lin Qiao Ying alias Qiqi were charged with possession of drugs under s 12(2) of the DDA. Based on these evidence, the learned judicial commissioner found that the appellant had mens rea possession of the drugs in the four charges. This was what His Lordship said at paras 33–34 and 37 of his judgment at pp 20–22 of Vol 1 of the appeal record:

> [33] Berdasarkan keterangan di atas, hanya satu inferen yang boleh dibuat iaitu OKT mempunyai jagaan atau kawalan ke atas barang kes pada masa material. Mahkamah berpuas hati bahawa intipati 'mens rea posession' telah berjaya

dibuktikan terhadap OKT kerana dadah tersebut telah dibuktikan sebagai milikan eksklusif OKT dan bukan kepunyaan sesiapa pada masa material. Tidak terdapat mana-mana orang lain bersamanya ketika itu. Ini bermakna OKT mempunyai 'physical custody and control' dan juga pengetahuan (yang boleh di infer berdasarkan 'conduct' OKT dan fakta matrik kes terhadap dadah tersebut.

[34] OKT mempunyai kawalan atau jagaan ke atas dadah yang ditemui pada tangan OKT serta dadah-dadah yang dijumpai di dalam kenderaan X-Rail tersebut kerana dadah-dadah tersebut berada bersama-sama OKT dan di dalam harta OKT pada masa material. OKT mempunyai kuasa pada bila-bila masa untuk melupuskan/membuang barang-barang kes itu memandangkan OKT sendiri yang memegang dadah-dadah tersebut dengan menggunakan tangannya serta dadah berada di dalam bonet kenderaan milik OKT sendiri ...

...

[37] Tindakan dan reaksi OKT yang terkejut apabila dia ditangkap selepas pemeriksaan dibuat ke atasnya di tepi lif pada masa itu terkejut dan dia ada mengatakan 'Boleh tolong tak?' kepada SP3 menunjukkan satu 'conduct' yang menunjukkan OKT mempunyai pengetahuan mengenai kandungan dadah di dalam raga motorsikal tersebut. Di dalam kes *Parlan Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717, Mahkamah Persekutuan memutuskan:

> In this case the reaction of the appellant in looking stunned or shocked upon being approached by the police is clearly admissible under s 8 since it has a direct bearing on the fact in issue as the drugs found were tucked away in the front of the jeans worn by him.

[8] After arriving at the aforementioned conclusion, the learned judicial commissioner proceeded to consider the issues raised by the defence which was the exclusive possession of the appellant of the said drugs, the appellant's lack of knowledge about the drug, the inapplicability of the two presumption on knowledge and trafficking under s 37(d) and (da) as well as the adverse inference under s 114(g) of the Evidence Act 1950 for the prosecution's failure to tender the arrest report in respect of the five persons arrested at the said penthouse which His Lordship refused to raise. Then in the next following paragraphs, that is paras 55–56 of the judgment, this is what His Lordship said before laying out the defence of the appellant:

[55] Setelah menimbang dan membuat penilaian maksima terhadap keterangan yang dikemukakan saya mendapati pihak pendakwaan telah berjaya membuktikan kes prima facie terhadap Tertuduh bagi kesemua pertuduhan yang dikenakan terhadapnya yang sekiranya tidak disangkal akan mengakibatkan (*warrant*) kesabitan. Oleh itu Tertuduh diperintahkan dipanggil untuk membela diri.

[56] Dengan penemuan ini bahawa kawalan dan jagaan OKT ke atas dadah di tangannya dan di dalam keretanya membawa inferens dadah itu berada dalam milikan OKT dan ini telah mencetuskan anggapan pengetahuan mengenainya di bawah s 37(d) ADB dan anggapan pengedaran di bawah s 37(da) Akta terpakai terhadap OKT maka pertuduhan telah dibukti terhadap OKT.

[9] At this juncture, we are constrained, with all due respect to the learned judicial commissioner, to point out the inconsistency in his finding because as reproduced earlier in our judgment, His Lordship had assessed the evidence of the prosecution and found mens rea possession. Then in the paragraphs just reproduced above he invoked that presumption of knowledge under s 37(d) of the Act. Also with respect to His Lordship, and whilst acknowledging that judgment writing is a question of style and not strictly done according to any standard format, in our view it would have been a better option to consider the issues raised by the defence on whether a prima facie case has been made out against the appellant before and not after making the earlier finding about mens rea possession. We would delve into this issue again in the later part of our judgment. For now, we would summarised the defence of the appellant.

THE DEFENCE

[10] The appellant gave sworn evidence and also called his friend, one Chiew Thiam Peh ('DW2') who was one of the five arrested at the penthouse as his witness and to whom he sold the items called 'Ubat Batuk Landak' for RM46,000. When DW2 called him for the delivery of the said items at 11am on 30 December 2016 DW2 invited him to attend a drinking cum karaoke party at the penthouse and informed him that besides the two of them two others would be attending the party too, this one Singaporean named Chua and one Malaysian, Ah San. At 3pm that day he received a call from Chua asking him about the party and asking him to fetch Qiqi at 7pm from Larkin Terminal Johor Bahru. So he did and at that place he saw her carrying the black bag and the red plastic bag where the drugs were subsequently found. They then went to meet DW2 at a condominium complex called Suria where he delivered the said 'Ubat Batuk Landak' and was paid by DW2 in cash in the sum of RM40,000 (which in the later part of his evidence he said was RM46,000 plus). Whilst he was talking to DW2, Qiqi alighted from the car and put her two bags into the boot of the car, which according to her was for safety reason. They then proceeded to the penthouse for the party which was also attended by one Vietnamese lady named Ah Dy besides the others mentioned above. Whilst there Qiqi received a call and said someone will pick her up and asked the appellant to accompany her to get her bags from the boot of his car. On their way out of the penthouse, she passed him the two packets which contained the drug and asked him to wait for her at the door because she needed to go to the toilet. It was when he was waiting for her outside the lift that he was arrested by the police. He said he was shocked and frightened and did tell the police that the drugs were not his and asked for their help in Bahasa Malaysia. Whilst he was arrested, the appellant said DW2 came out from the penthouse and was also arrested by the police who then proceeded to raid the penthouse and arrested those inside.

[11] In cross-examination, the appellant said there was no receipt for

payment of the said *ubat* and he was in that business for five years at that time. According to the appellant, the police did seize some of the *ubat* from his car too.

[12] DW2, whom the appellant identified as Abang Poh in his evidence in court confirmed about the purchase of the said *ubat*, the invitation to the party and the call he made before that to the appellant, the delivery of the *ubat* at his condominium and the party at the penthouse. He also confirmed seeing Qiqi alighting from the front passenger seat of the car whilst the appellant was making the delivery to him and opening the boot of the car and closing the boot before going back to the car. He confirmed attending the party at the penthouse which the appellant and the other four persons named by him including Qiqi, the appellant wanting to leave with Qiqi and that she went to the toilet when the appellant exited the penthouse. DW2 confirmed the police raid at the penthouse and their arrests and said he too was charged in court but he was not sure if the others were.

[13] In cross-examination by the learned DPP he agreed that there was no receipt for the purchase of the *ubat* and the payment was by cash, that he was charged and fined RM3,000 by the court based on the urine test conducted on him. In re-examination he said he was never requested by the police to give his evidence after his arrest and reiterated his evidence in cross-examination that he did not lie in court just to save the appellant.

[14] The learned judicial commissioner rejected the defence of the appellant as being one of an afterthought because His Lordship said he never told the police that the drugs found with him and in his car belonged to Qiqi. This was what His Lordship said at paras 72 and 75 of his judgment:

> [72] OKT tidak pernah memaklumkan kepada pihak polis bahawa dadah yang ditemui pada tangan dan di dalam kenderaan itu bukan miliknya tetapi dimiliki rakan bernama Lin Qiao Ying (Qiqi). Tidak ada siasatan yang dapat dilakukan oleh SP1 untuk menyangkal versi fakta OKT tersebut, khususnya berkaitan dengan kewujudan Qiqi, yang mana tidak diberikan oleh OKT pada peluang terawal yang mungkin apabila ia dia ditahan oleh SP3 dan semasa siasatan oleh SP1 ...
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> ...
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> [75] Sama ada dadah yang dijumpai di dalam kereta OKT adalah kepunyaan Qiqi tidak menjadi isu. Yang menjadi isu ialah sama ada OKT mempunyai pengetahuan mengenai dadah itu sebelum dan semasa dia ditahan. Oleh itu Qiqi bukan saksi penting dan tidak diperlukan bagi pembuktian kes pendakwa. Maka s 114(g) Akta Keterangan 1950 tidak berkaitan. Penglibatan Qiqi dalam kes ini hanya dibangkitkan oleh OKT dalam pembelaannya. Atas asas itu, Mahkamah ini boleh menganggap bahawa kemunculannya sebagai 'afterthought'.

[15] The learned judicial commissioner also commented adversely on the

appellant's failure to give the information about Qiqi when he was arrested and when he gave his caution statement which he said moved him to reject his defence. As for DW2, all that His Lordship said in a paragraph just one before concluding his judgment was this:

> [81] Lagipun penglibatan SB2 yang merupakan sebahagian kes pembelaan, oleh itu terpulang kepada OKT untuk mengemukakan apa-apa keterangan yang boleh menyokongnya atau yang boleh menerangkan bagaimana dadah itu boleh berada di dalam kereta tersebut. Pernyataan SB2 dan *OKT2* yang dirakam oleh SP1 dan pegawai penyiasat di dalam kes satu lagi mungkin boleh membantu tetapi tidak dikemukakan. Beban terletak di bahu OKT untuk mematahkan anggapan pengetahuan dan mengedar apabila pembelaan dipanggil. Oleh itu cerita pembelaan tidak mungkin benar. (Emphasis added.)

We noted the error in the above paragraph as highlighted as there was no OKT2 but to be fair to the learned judicial commissioner, that could have been a typographical mistake only.

THE APPEAL

[16] Two grounds were raised before us by learned counsel for the appellant which are in the alternative and reproduced verbatim below:

(i) That the learned trial judge (LTJ) erred in the assessment of the defence of the Appellant; and

(ii) Alternatively, the learned trial judge erred when his Lordship relied on both the presumptions under s 37(d) and s 37(da) to find there was a prima facie case of trafficking and consequently convict the Appellant for the offence of trafficking.

We would deal with the alternative ground first, which is the issue on the invocation of the double presumptions for our consideration of that issue is simply this.

[17] Granted that the Federal Court in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 had ruled that s 37A of the DDA which allows the invocation of both the presumption of possession and knowledge under s 37(d) and that of trafficking under s 37(da), that decision was delivered on 5 April 2019 which was after the decision of the learned judicial commissioner on 29 October 2018 to convict the appellant and just slightly three months before we heard the appeal. Therefore, the law as it stood then when that decision was delivered was that the invocation of the double presumptions was permissible in law. Since there was no pronouncement by the Federal Court in *Alma*'s case that the decision was retrospective, technically we could not say that the learned judicial commissioner had erred when he invoked the double presumptions. However,

we noted, as submitted by learned counsel for the appellant that based on the said case authority, convictions entered for drug trafficking post *Alma*'s case had been substituted with just possession under s 12(2) of the DDA. We would have done just that for this case but for the fact that we found merit in the first issue raised by learned counsel for the appellant and found, when we examined the evidence as against the grounds of judgment of the learned judicial commissioner that, with respect, he had committed some serious misdirections in fact and in law.

MISDIRECTIONS

[18] As we had reproduced earlier in our judgment, the learned judicial commissioner had found that the appellant had mens rea possession and yet raised the presumption on knowledge under s 37(d) of the DDA which with respect was a serious misdirection on his part. What is even more serious, as demonstrated by the appellant's learned counsel before us, was that wrong finding by His Lordship that the defence was an afterthought because he was of the view that what the appellant said about Qiqi putting the bag containing the drugs in the boot of his car was only brought up in the defence (see para 75 of His Lordship's judgment which we had reproduced earlier). However, contrary to that finding, learned counsel for the appellant had referred us to the relevant excerpts of the notes of proceedings where the appellant's defence was put to both PW1 and PW3, the two material prosecution witnesses being the arresting officer and investigating officer respectively. What was put to PW3 are these:

(i) S: Ini adalah arahan daripada anak guam saya so tuan boleh setuju ataupun tidak setuju. Arahan anak guam saya bahawa beg plastik yang dipegang di tangan ataupun yang mana beg plastik bunga yang tuan dapati di tingkat 24 itu sebenarnya telah diberikan oleh salah satu tangkapan tuan iaitu Lin Qiao Ying, tuan setuju atau tidak setuju atau tidak tahu. Lin Qiao Ying iaitu salah satu tangkapan oleh Tuan Hisam.

J: Tidak tahu.

(see p 149 Vol 2 of the appeal record).

(ii) S: Seterusnya berbalik kepada tangkapan 5 orang tuan buat tadi, setuju tak dengan saya bahawa, sorry, Yang Arif. I cancel that question. Seterusnya Tuan Hisam arahan anak guam saya adalah bahawa setuju tak ataupun mungkin tuan tak tahu ataupun tidak setuju bahawa dadah-dadah yang telah dijumpai di kereta adalah sebenarnya milik Lin Qiao Ying yang telah ditangkap oleh pihak tuan dan seterusnya Lin Qiao Ying ini

Mahkamah: You put to him, maknanya saya katakan.

S: Saya katakan bahawa Lin Qiao Ying telah menumpang kereta tertuduh untuk Zenith Suit/tempat kejadian dan dadah yang dijumpai telah diletakkan di sana oleh Lin Qiao Ying tanpa pengetahuan tertuduh. Tuan tak tahu?

J: Soalannya?

S: Saya katakan, tuan boleh kata setuju ataupun tak setuju.

J: Saya tak tahu.

S: Dia macam cerita. So cerita ataupun pembelaan tertuduh ialah bahawa Lin Qiao Ying ini telah menaiki kereta tertuduh untuk ke Zenith Suite dan dadah yang dijumpai oleh pihak tuan milik Lin Qiao Ying dan diletakkan di sana oleh Lin Qiao Ying.

J: Saya tidak tahu, Yang Arif.

S: Dan ini adalah sama juga bagi dadah yang dipegang peket-peket plastik bunga yang ini juga telah diserahkan oleh Lin Qiao Ying kepada tertuduh di mana Lin Qiao Ying telah meminta tertuduh menunggu dia di luar di hadapan, tuan ada pengetahuan?

J: Tidak ada, Yang Arif.

S: Akhir sekali, dan sebenarnya tertuduh tidak ada pengetahuan ataupun tidak pernah tahu menahu tentang dadah-dadah yang telah tuan jumpai. Saya katakan, tuan boleh setuju ataupun tidak setuju ataupun tidak tahu.

J: Tertuduh tidak tahu?

(see pp 164–165 of appeal record Vol 2)

[19] As for PW1, the relevant part of his evidence are as follows:

(i) S: Puan, sekarang ini saya akan tanya memberikan cadangan kepada puan, puan boleh setuju atau tidak setuju. Saya cadangkan bahawa beg plastic bunga yang dipegang tertuduh di depan pintu rumah kanan telah diberikan oleh Lin Qiao Ying, kamu setuju?

J: Tidak pasti, Yang Arif.

S: Seterusnya saya cadangkan bahawa tertuduh sebenarnya tidak tahu apa yang berada di dalam plastik dan hanya menunggu Lin Qiao Ying di luar rumah sebelah kanan saja, puan setuju?

J: Tidak pasti, Yang Arif.

(ii) S: Dan saya cadangkan bahawa Lin Qiao Ying sebenarnya telah tumpang kereta dalam kes ini JRE 5526 untuk pergi ke Zenith Suite, puan setuju?

J: Saya tidak pasti, Yang Arif.

S: Dan saya cadangkan bahawa sebenarnya Lin Qiao Ying telah pergi ke Zenith Suite bersama dengan tertuduh dan dadah yang di dalam kes ini diletakkan di dalam bonet oleh Lim sendiri, kamu setuju?

J: Tidak setuju, Yang Arif.

S: Saya cadangkan bahawa tertuduh tidak ada pengetahuan langsung mengenai dadah yang dijumpai di belakang bonet, kamu setuju?

J: Tidak setuju, Yang Arif.

(see pp 236–238, Vol 2(1) of the appeal record).

[20] Not only had the learned judicial commissioner, again with respect, fallen into error when labelling the defence as an afterthought based on the evidence highlighted above, His Lordship also fell into the same error when he failed to appreciate the defence of the appellant, in particular about him picking up Qiqi and her putting the bag in the boot of the car which had been corroborated by the evidence of DW2. The burden of the appellant at the close of his defence is only to raise a reasonable doubt on the prosecution's case and where a presumption has been raised, then to rebut the same on a balance of probability. In this case not only DW2, a co-arrestee came forward to give evidence, there was evidence from PW3 (at p 234 Vol 2(1) of the appeal record) that the ecstasy pills which were found in the penthouse shaped like a flower (see the photographs marked D at p 388 of Vol 3 of the appeal record) were also found in the bag which was in the car's boot. This renders the probability that the said drugs was brought by Qiqi to the penthouse and that she was the real trafficker. Thus when the trial judge had committed such a misdirection which in this case has led to his failure to give due consideration or evaluation on the evidence adduced by the defence and prejudiced his mind against it, we were left with no other alternative but to discharge and acquit the appellant for in the face of such misdirection that conviction could not stand. Amongst others, the Federal Court's decision in *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705 has made this point very clear and it is appropriate for us to now reproduce an excerpt from the decision of this court in *Mohd Johi bin Said & Anor v Public Prosecutor* [2005] 5 MLJ 409 at p 417; [2005] 1 CLJ 389 at p 396 on the effect of such a misdirection below:

> We have here a case where a serious defence, supported by credible evidence was presented to the court. It was the bounden duty of the learned trial judge to consider that defence. This was not done. There was simply no judicial appreciation of the defence case. This is accordingly a case of non-direction by the learned judge unto himself. And we find it sufficient in this context to quote from two authorities merely to remind ourselves of the importance of the point that is being made. In *Balasingham v Public Prosecutor* [1959] 1 MLJ 193, Ismail Khan J (later CJ Borneo) said:
>
> > There was therefore a direct conflict of evidence and a serious defence cannot be summarily dismissed as an improbable story without adequate reasons for such a conclusion.
>
> In *Gooi Loo Seng v Public Prosecuto* [1993] 2 MLJ 137 at p 142, Edgar Joseph Jr SCJ when delivering the judgment of the Supreme Court said:
>
> > Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant

had lost the chance which was fairly open to him of being acquitted. On this point, we consider that the non-direction amounts to a misdirection, for, in the words of Pickford J in *R v Bundy* (5 Cr App R 270):

> the trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence.
>
> We must treat the failure of a trial judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

Unlike civil appeals, where the appellant carries the burden of showing that the judge at first instance went wrong, in a criminal case the duty of the court is to consider whether the conviction is right. The correct approach is therefore not whether the decision is wrong but whether the conviction is safe. See, *Mohammad Husain v Emperor AIR* [1945] Nag 441; *Zahari bin Yeop Baai v Public Prosecuto* [1980] 1 MLJ 160. That question, on the present facts, must receive a negative response.

[21] We are further fortified in our view above on the misdirection of the learned judicial commissioner by the fact that the arrest in the penthouse and that of the appellant right outside it could not, as contended by the prosecution, be unrelated for it must be remembered that PW3 in his evidence had admitted that the information he received was on the drug activities in the penthouse. The evidence of DW2, not just the mere statement from the appellant on the familiarity of the arrestees in the penthouse with the appellant, who we must stressed was just a visitor there, further strengthened that connection. Therefore, the defence of the appellant must also be viewed and considered in the light of that connection. It is salutary to also bear in mind the trite law that the court must consider the defence, no matter how weak it is and must acquit the accused if the prosecution has failed to discharge the burden of proof which it bears from the beginning till the end of the case.

[22] With respect to the learned DPP, it is not just the issue of ownership of the drug which was raised in the defence — it is the knowledge of the appellant that the bag in the boot of his car contained drugs. Without that knowledge he could not be found to be trafficking in it. Here the probability that he had no such knowledge had been shown from both his evidence and that of DW2 as well as the absence of Qiqi's evidence at the trial. Based on our considerations above, we found that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. We therefore allowed his appeal, set aside the conviction and sentence imposed by the learned judicial commissioner and substituted it with an order of discharge and acquittal.

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali